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LABOUR & EMPLOYMENT DEPARTMENT

NOTIFICATION

The 29th January 2011

No. 1152—li/1(B)-127/2006-LE.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 7th January 2011 in I. D. Case No. 29 of 2007 of the Presiding Officer, Labour Court, Bhubaneswar to whom the industrial dispute between the Management of General Manager, NALCO (Project I.A. P.L.), NALCO Nagar, Angul and their Workman Shri Basanta Kumar Nayak was referred to for adjudication is hereby published as in the Schedule below :

SCHEDULE

IN THE LABOUR COURT, BHUBANESWAR

INDUSTRIAL DISPUTE CASE No. 29 OF 2007

Dated the 7th January 2011

Present :

Shri S. K. Dash,
Presiding Officer,
Labour Court, Bhubaneswar.

Between :

The General Manager,
NALCO (Project-I.A.P.L.),
NALCO Nagar, Angul.
And

.. First Party—Management

Their Workman,
Shri Basanta Kumar Nayak.

.. Second Party—Workman

Appearances :

Shri S. S. Panda, Manager (HRD)	..	For the First Party—Management
Shri B. K. Nayak	..	For the Second Party—Workman himself.

AWARD

The Government of Orissa in exercise of the powers conferred by sub-section (5) of Section 12 read with clause (c) of sub-section (1) of Section 10 of the Industrial Disputes Act have referred the matter in dispute to this Court vide order No. 9120—II-1(B)-127/2006-LE., dated the 27th July 2007 of the Labour & Employment Department, for adjudication.

2. The reference be stated as is follows:

“ Whether the action of the Management of NALCO (Project-I.A.P.L.), NALCO Nagar, Angul in refusing employment to Shri B. N. Nayak (employee of erstwhile I.A.P.L. with effect from the 14th March 2000 is legal and/or justified ? If not, what relief the workman Shri Nayak is entitled to ?”

3. The case of the workman in brief is that he was he working as Caretaker-*cum*-Office Junior Assistant under the control of M/s International Aluminium Products limited (in short I.A.P.L.) for the period from the 4th September 1997 to 13th March 2000 and completed more than 240 days continuous employment in a twelve calendar months. The I.A.P.L. establishment had been running jointly with the management. In 1998 the establishment of the I.A.P.L. was shifted to Angul where the business were running with the present management and the Chief Executive and Director was the authority to look after the business of the I.A.P.L. subsequently the establishment of I.A.P.L. was merged with the present management and all assets and liabilities, erstwhile all workers/staffs have been under the control of the present management except the present workman. While submitting status report by the erstwhile I.A.P.L. to the management, the name of the workman was recorded but as per status report the management has given employment to all erst while workers except the present workman for the reasons best know to him. The service of the workman was terminated by the management without complying mandatory provisions of the Industrial Disputes Act and he was getting Rs. 1,500 per month at the time of termination. The workman had submitted series of representations to the management starting from the 19th March 2000 but it was invain. After termination of employment the workman was never gainfully employed elsewhere. The workman raised an industrial dispute before the labour authority and when the conciliation failed the matter was referred to the Government and the reference was received and this I.D. Case has been initiated wherein the workman the has prayed for reinstatement in service with full back wages.

4. The management appeared and filed written statement partly admitting and partly denying the plea of the workman. According to him, there is no General Manager post in the management designated as General Manager (Project I.A.P.L.). The erstwhile I.A.P.L. after

merger with the present management is presently known as Rolling Plant of Smelter under the control of General Manger (Smelter). The workman was at no point of time an employee of erstwhile I.A.P.L. The mere production of a letter addressed to the management stating that his name is being considered for employment in I.A.P.L. does not entitle him for a job in the management. If at all the workman was working for the so called registered office of I.A.P.L. at Bhubaneswar, it is not clear that under what conditions he was engaged. However, it is a fact that the workman was never employed by I.A.P.L. The workman was never engaged by M/s I.A.P.L. as a Caretaker or any other capacity. In fact the registred office of M/s I.A.P.L. was in existence Bhubaneswar from the 13th November 1996 to the 29th July 1998 which was later on shifted to Angul. I.A.P.L. was taken over by the present management during March 2000 and the claim that I.A.P.L. was being run jointly by the present management for the period from the 4th September 1997 to the 13th March 2000 is false. As per the arrangement all the employees of the erstwhile I.A.P.L. were to be retained by the the present management. Since the workman was not employed by M/s I.A.P.L., his name did not figure in the list of employees/workman submitted by the I.A.P.L. Hence the workman was not absorbed by the management. When the workman was never employed as a workman either by the erstwhile I.A.P.L. or by the present management the question of mandatory preconditions of a valid retrenchment as per Industrial Disputes Act does not apply. The claim of the workman getting wages of Rs. 1,500 per month is totally a false one. The so called status report of I.A.P.L. contained the name of five persons whose apointment were stated to be in process wherein the name of the workman was included. Prior to take-over, the services of the Project Administrator was terminated and final settlement for him was done by the I.A.P.L. The management retained all the 25 permanent employees. The management has also taken over the 13 Nos. of trainees recruited under the rehabilitation policy of I.A.P.L. for the land displaced persons. The management retained all the 38 employees of I.A.P.L. in the 100% subsidiary I.A.P.L. As the workman and one Shri Krishna Rao were never employed by I.A.P.L., their names were not forwarded to the mangement for retention. When the workman was never employed by the erstwhile I.A.P.L., the question of master and servant relationship does not arise and the provisions of the Industrial Dispute Act is not applicable to the present case. So in this back ground the management has prayed for to reject/dismiss the claim petition of the workman.

5. In view of the above pleadings of the parties, the following issue are settled:—

I S S U E S

- “(i) Whether the action of the management of NALCO(Project I.A.P.L.)NALCO Nagar, Angul in refusing employment to Shri B. N. Nayak (employee of erstwhile I.A.P.L.) with effect from the 14th March 2000 is legal and/or justified ?
- (ii) If not, what relief the workman Shri Nayak is entitled to ?”

6. In order to substantiate his plea, the workman has examined two witnesses altogether out of whom W.W. 1 is the workman himself and W.W. 2 is a labourer who was working as a Driver-cum-Peon under the management. The workman has proved documents marked as Exts. 1 to 19. Similarly the management examined his Deputy Manager (System) as M.W. 1 and proved the documents marked as Exts. A to D.

F I N D I N G S

7. *Issue Nos. (i) and (ii):*—Both the issues are taken up together for discussion for convenience.

According to W.W. 1, he was working as an office Assistant-cum-Caretaker in erstwhile I.A.P.L. from the 4th September 1997 to the 13th March 2000 and completed more than 240 days of continuous service in twelve calendar months, but his service was terminated without complying the mandatory provisions of Section 25-F and G of the Industrial Disputes Act. The new management i.e. NALCO, Angul has already been given an employment in accordance with the status report dated the 18th June 1999. He was receiving his wages at the rate of Rs. 1,500 per month at the time of termination of his service. Subsequently, another status report was prepared on the 10th January 2000 which was signed by the Project Administrator in which the name of the workman as well as another employee vide Sl. No. 4 and 5 of Annexure II of Ext. 1 does not find place though the name of Sl. Nos. 1 to 3 find place. W.W. 2 also deposes the same thing corroborating the evidence of W.W. 1, W.W. 2 was working as Driver under the management from the 27th July 1997 to the 13th March 2000. The M.W. 1 deposes that the workman was never employed under erstwhile I.A.P.L. or under the present management for which complying of Section 25-F of the Industrial Disputes Act does not arise and the workman is not entitled to get any relief. Perused the documents proved and marked as exhibits on behalf of both the parties. In the cross-examination W.W. 1 has admitted that no appointment letter was issued to him, But he was working under erstwhile I.A.P.L. as Office Assistant-cum-Caretaker in the Guest House situated at Plot No. C-256, Forest Park, Bhubaneswar. After merger of the erstwhile I.A.P.L. with the present management the said Guest House has been closed and the employment of the workman was terminated by way of refusal of employment.

8. It has been argued by the management that at no point of time the workman was an employee of erstwhile I.A.P.L. The so called status report of I.A.P.L. dated the 18th June 1999 along with others contained the name of five persons whose appointment were stated to be in process wherein the name of the workman was included. However, mere mention of the name of the workman in the so called status report under the heading “appointment in process” does not make him an employee of I.A.P.L. Ext. 1 is the xerox copy of the status report dated the 18th June 1999 wherein the salient facts relating to the human resources of

I.A.P.L. are given. The Sl. No. 1 of Ext. 1 disclose about the permanent employees and Sl. No. 2 contains about the appointments in process. In Sl. No. 2 it clearly shows that an employee on the rolls of Mukand Ltd., who is a Graduate Engineer in Electrical Engineering was recruited in 1992 for preliminary work relating to I.A.P.L. and has continued to be engaged in I.A.P.L.'s work. It is also clearly mentioned in Ext. 1 that two employees who hold temporary appointments in Mukand Engineers Ltd., one of them a Graduate in Mechanical Engineering and the other one a M.A., LL. B. are being appointed in I.A.P.L., as both of them have been engaged exclusively in work relating to I.A.P.L.'s project at Angul. Two other persons, one a Graduate who has been providing lower level administrative assistance to the company and other who has been doing miscellaneous work, are also being appointed in I.A.P.L. The Annexure II attached to Ext. 1 discloses that the employees who have been engaged in I.A.P.L.'s work and are being appointed in I.A.P.L. The name of the workman finds place at Sl. No. 4 of Annexure II. But subsequently in Ext. C the detailed manpower statement as on August 1999, of I.A.P.L. has been prepared wherein the name of 12 persons found place with detailed particulars. Sl. Nos. 10 to 12 of Annexure II of Ext. 1 were found place wherein the name of the Sl. No. 4 (Present workman) and Sl. No. 5 are not found place. Most of documents marked as exhibits on behalf of the workman including Exts. 18 and 19 show that the workman was working as office Assistant-*cum*-Guest House Caretaker of I.A.P.L. at Bhubaneswar. When the workman was working as such under I.A.P.L. and his name was found place in Annexure II of Ext. 1, how the name of the workman has been omitted in Ext C. It has been argued by the management that basing on the report of the erstwhile I.A.P.L. the persons were appointed in the management and when the name of the workman was not found place in the list, his employment was not taken into consideration. But when there is clear evidence which includes temporarily that the workman was working under erstwhile I.A.P.L. as an office Assistant-*cum*-Guest House caretaker, I found no reasonable ground to disbelieve as all the documents marked as exhibits were marked without objection. The management has filed the xerox copy of The Gazette of India Extraordinary dated the 9th November 2001 regarding publication of the Notification dated the 7th November 2001. Though it has not been marked as exhibit, the Court can take judicial notice of it. According to the said Notification the relevant portion of such Notification in respect of Para. 7 reads as follows:—

“ 7. Saving of legal proceedings—If on the appointed day, any suit, prosecution, appeal or other legal proceeding of whatever nature by or against the dissolved company be pending, the same shall not abate or be discontinued, or be in any way prejudicially affected by reasons of the transfer to the resulting company of the undertaking of the dissolved company or of anything contained in this order, but the suit, prosecution, appeal or other legal proceeding may be continued, prosecuted and enforced by or against the resulting company in the same manner and to the same extent as it would have or may be continued, presecuted and enforced by or against the dissolved company if this order had not been made.”

Similarly Para. 13 of the same reads as follows :

“13. Dissolution of the International Aluminium Products Limited—Subject to the other provisions of this order, as from the appointed day, the International Aluminium Products Limited shall be dissolved and no person shall make assert or take any claims, demands or proceedings against the dissolved company or against a Director or any Officer thereof in his capacity as such Director or Officer, except in so far as may be necessary for enforcing the provisions of this order.”

So in view of such Notification legal proceedings be continued and no person can make any proceeding against the dissolved company erstwhile I.A.P.L. and all the liabilities was taken over by the NALCO, the present management. In view of the authority reported in A.I.R. 1988 S.C. 215 in every case of transfer, devolution, merger, take over or a scheme of amalgamation under which the rights and liabilities of one company or corporation stand transferred to or devolve upon another company or corporation either under a Aprivate treaty, or ajudicial order or under a law, the transferee company or corporation as a successor-in-interest becomes subject to all the liabilities of the transferor company or corporation and becomes entitled to all the rights of the transferor company. So in view of such authority the transferee company is a successor-in-interest and became subject to all the liabilities of the I.A.P.L.

9. It has been argued by the management that no pay slip regarding payment of wages by the workman has been filed to prove that actually he was working under the erstwhile I.A.P.L., and was receiving his salary from him. So it has been argued that it cannot be belived that the workman was working under I.A.P.L. According to the settled principle of law reported in A.I.R. 2010 SC.1236 the workman would have difficulty in having access to all official documents, muster rolls etc. in connection with his service. When the workman claimed and deposed that he worked for 240 days, burden of proof shifts to employer to prove that he did not complete 240 days of service in requisite period to constitute continuous service. In the authority reported in 2008 LLR 549 the Hon'ble Supreme Court has held that certain records may be under exclusive custody of the employer and the workman may not be able to lay their hands thereupon and prove that they worked for requisite number of days. If the employer withholds those records, adverse inference may be expressed or implied and must be considered upon reading the entire Award. In the instant case merely denying about the employment of the workman under the erstwhile I.A.P.L. the present management has not produced any document of the relevant period to show that the workman was not working under erstwhile I.A.P.L. On the other hand, all the documents marked as exhibits on behalf of the workman clearly show that the workman was working under erstwhile I.A.P.L. for the relevant period as mentioned earlier. The employment of the workman was refused by the management with effect from the 14th March 2000 without complying the provisions of Section 25-F of the Industrial Disputes Act which is a precondition and mandatory one. So on careful consideration of all the materials available in the case record as discussed above, I am inclined to hold that the action of the management in refusing employment to the workman with effect from the 14th March 2000 is neither legal nor justified. Therefore, the workman is entitled for

reinstatement in service.

10. Regarding back wages, according to the settled principle of law the relief of reinstatement with full back wages would not be granted automatically only because it would be lawful to do so. For the said purpose several factors are required to be taken into consideration. Further according to the authority reported in 2004 (Supp.) OLR 694 when the workman had not worked for the management during the period in question and he had not proved by cogent evidence that he was not gainfully employed elsewhere, payment of back wages is not justified. However on careful consideration of all the materials available in the case record as discussed above, I am of the opinion that instead of granting any back wages a lump sum amount of Rs. 25,000 as compensation will meet the ends of justice in this case. Hence both the issues are answered accordingly.

11. Hence Ordered :

That the action of the management of NALCO (Project-I.A.P.L.), NALCO Nagar, Angul in refusing employment to Shri B. N. Nayak (employees of erstwhile I.A.P.L.) with effect from the 14th March 2000 is illegal and unjustified. The workman Shri Nayak is entitled to be reinstated in service with a lump sum amount of Rs. 25,000 (Rupees twentyfive thousand) only as compensation in lieu of back wages. The management is directed to implement this Award within a period of one month from the date of its publication in the official Gazette, failing which the amount shall carry interest at the rate of 9% (nine per cent) per annum till its realisation.

The reference is answered accordingly.

Dictated and corrected by me.

S. K. DASH
07-01-2011
Presiding Officer
Labour Court, Bhubaneswar

S. K. DASH
07-01-2011
Presiding Officer
Labour Court, Bhubaneswar

By order of the Governor
P. K. PANDA
Under-Secretary to Government